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DEC 21 1942

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 592

In the Matter of the Application of the People of the State of New York by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the Lawyers Westchester Mortgage and Title Company.

In the Matter of a Plan of Readjustment, Modification or Reorganization of the Rights of the Holders of Mortgage Investments in a certain mortgage guaranteed by Lawyers Westchester Mortgage and Title Company and designated as Issue No. 5-7902.

In the Matter of the application for instructions as to disposition to be made of dividend payments on account of claims allowed on guaranty.

WILLIAM A. DARLINGTON, ISAAC SHERMAN, HARRY S. BRESNICK and HELEN SWAN,

Petitioners,

PATRICK H. HUSSEY and others, constituting the firm of HUSSEY & CONVERSE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

CHARLES [illegible],

Attorney for Petitioners.

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WILLIAM A. DAVIDSON, ISAAC SHENDELL, CARL S. BRESNICK and HELEN SEGAL,

Petitioners,

FREDERICK H. HURDMAN and others comprising the firm of HURDMAN & CRANSTOUN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners are holders of certificates of participation in a bond and mortgage guaranteed by Lawyers Westchester Mortgage and Title Company in Liquidation under the direction of the Superintendent of Insurance of the State of New York, pursuant to the provisions of the Laws of 1933, Chapter 745 of the State of New York, as thereafter amended, known as and hereafter referred to as the Schackno Act. The petitioners were parties to proceedings in the State Courts brought as a "Test Case" to determine whether certain monies received by statutory trustees in the said mortgage issue comprised trust assets and whether they were applicable to the payment of creditors of the trust estate. The proceedings in the State Courts constituted a "Test Case" for hundreds of other trust estates similarly situated in which the same or other statutory trustees were confronted by the same question. Petitioners pray that a writ of certiorari issue to review the final order and judgment, entered on October 27, 1942, upon the remittitur of the Court of Appeals, the highest court of New York State (R. 143-145), reversing intermediate New York State court orders entered April 19, 1941 (R. 9-14), and June 23, 1941 (R. 139-140). By such reversal the Court of Appeals held that the dividends paid by the Superintendent of Insurance as the Liquidator of the said Title Guaranty Company, although paid upon guaranties which were the personal assets and property of the certicate holders (some of whom were involuntary parties to the trust indenture), were to be deemed part of the trust estate and as such chargeable with the debts of the said estate, notwithstanding that the provisions of the trust indenture exonerated the certificate holders (the cestuis of the trust) from any personal liability therefor.

A

Opinions Below

The proceeding was brought on by petition before an Additional Term of the Supreme Court of the State of New York, held in and for Westchester County (R. 15-24), and the opinion of the Justice before whom the same was argued is reported in 176 Misc. Rep. 435 (R. 123-133). The Appellate Division of the Supreme Court of the State of New York, Second Department, unanimously affirmed without opinion (262 App. Div. 878) (R. 139). Other courts of original jurisdiction passed upon the identical question presented by this test proceeding, in connection with other trust estates eventuating from the rehabilitation or liquidation of other mortgage and title guaranty companies, and their opinions, all of which arrived at the same conclusion as the lower courts in the instant proceeding, are reported as follows:

Matter of Hudson Counties Title & Mortgage Co. (Series No. 177) (not officially reported). (See N. Y. Law Journal, Feb. 27, 1942, page 883, Vol. 107, No. 47, Nolan, J.);

Matter of New York Title & Mortgage Co. (163 Misc. Rep. 37, Frankenthaler, J.);

Matter of 610 West 145th Street (Union Guaranty & Mortgage Co.) (not officially reported). (See N. Y. Law Journal, Feb. 21, 1942, page 796, Vol. 107, No. 43, McLaughlin, J.);

In re State Title & Mortgage Co. (not officially reported). (See N. Y. Law Journal, Nov. 12, 1941, page 1458, Vol. 106, No. 111, McLaughlin, J.);

In re 24-52 Forty Fourth Street, L. I. C. (176 Misc. Rep. 249, Brower, J.).

In the instant proceeding, at the term following the term at which it had affirmed the order below, the Appellate

Division granted leave to appeal to the Court of Appeals, certifying that in its opinion a question of law was involved which ought to be so reviewed (R. 138). The Court of Appeals unanimously reversed and wrote an opinion reported in 288 N. Y. 40 (R. 157-167).

B

Statement of Facts

Prior to 1933 the Lawyers Westchester Mortgage and Title Company engaged in the business in the State of New York among other things of selling bonds and mortgages as participations therein, such sales being coupled with a so-called guaranty of payment of principal and interest. In those instances where it sold participations either in a single mortgage or in a group of mortgages it issued certificates to evidence such participating interest of the holder and it incorporated in such certificate its so-called "guaranty" for the payment of the principal and interest evidenced thereby. Actually the so-called "guaranty" was the direct obligation of the seller to pay to the certificate holder a specific sum of money together with interest at a specific rate on a specific date therein set forth. Many other title companies were similarly engaged. Such companies were organized under the Insurance Law or the Banking Law of the State of New York, and as such were not amenable to the jurisdiction of federal statutes. The New York State laws provided no mechanism for the liquidation of any such company which would find itself in distress. Approximately one billion of dollars in principal amount of such real estate mortgage investments had been sold, issued, distributed or guaranteed by such companies prior to 1933. As a result of the then existing disruption of economic and financial processes many of such investments were in default and it appeared that the companies were unable to cope with the situation

without serious detriment to the public welfare. Accordingly, the Legislature of the State of New York adopted the Schackno Act for the purpose of providing a procedure under which such bonds, mortgages or other security so guaranteed could be liquidated in an orderly manner and under which the assets of the guaranty corporations could be administered and conserved equally and ratably in the interests of holders of mortgage investments (Schackno Act, Sec. 1) (Appendix, pp. 13-14).

On August 11, 1933, the Superintendent of Insurance of the State of New York was appointed rehabilitator of the title company and took possession of its business, property and assets under Article XI of the Insurance Law of the State of New York (Consolidated Laws, Chap. 28) (R. 85-90).

On June 7, 1935, an order of liquidation was made by the Supreme Court of the State of New York in accord with the applicable statutes (R. 91-100). Therein it was provided among other things:

> (1) that creditors, including holders of guaranteed mortgage participation certificates issued by the title company, be enjoined from bringing any action thereon;
>
> (2) that all persons who had claims against the title company should be notified of such proceedings and directed to present such claims to the Liquidator on or before a specified date fixed as the final date for presenting claims; and
>
> (3) that creditors failing to file claims within the limited period should be barred from sharing in any distribution of the assets of the title company.

By an order of the Supreme Court of the State of New York, Westchester County, dated April 23, 1935, the mortgage investments underlying the series issue identified as No. 5-7902 were turned over by the Superintendent of Insurance to trustees therein designated pursuant to an

indenture of trust therein approved (R. 42-46). Only some of the participants in such issue consented. As to the others this was an involuntary trust (R. 17 at fol. 50).

The assets of the trust estate created pursuant to such order were therein defined as:

> "the bond(s) mortgage(s) and other property, securing and intended to secure said Issue No. 5-7902 Certificates, wherever situated, and all rights reserved or granted to or acquired by Lawyers Westchester Mortgage and Title Company or any other person, firm or corporation therein, in so far as the same has been or may be effectively transferred to the Trustees, including all bonds, mortgages, deeds and other property or any interest therein held by the Lawyers County Trust Company under a certain Deposit Agreement dated February 28, 1925, entered into between Lawyers Westchester Mortgage and Title Company as guarantor, and Lawyers County Trust Company, as depository, all cash and other property held by the Superintendent of Insurance as Rehabilitator or Liquidator or by any other person, firm or corporation for the benefit of the Certificate Holders and all real estate and other property acquired by foreclosure or otherwise, and held in the name of Law-West Holding, Inc., or any other subsidiary, of Lawyers Westchester Mortgage and Title Company, or in the name of any other agent or depository or of the Lawyers Westchester Mortgage and Title Company, or by any other person, firm or corporation, and all cash, securities, real and personal property hereafter acquired for or in behalf of the Trust Estate, together with all claims or choses in action which the Certificate Holders as a class have or may have against any person, firm or corporation with respect to any of the property included in the Trust Estate of whatsoever nature, whether arising out of the administration of the bond(s) and mortgage(s) underlying said Issue No. 5-7902.
>
> Certificates or otherwise, and particularly (but without limiting the generality of the foregoing) all rights, claims and choses in action which the Certificate Holders as a class have or may have against Lawyers Westchester Mortgage and Title Company upon its guar-

anty of said Certificates and/or of the bond(s) and mortgage(s) underlying the same" (R. 49 at fols. 146-149).

The trust indenture among other things provided:

"No assessment shall ever be made upon the Certificate Holders and the Trustees shall have no power to bind the Certificate Holders except as herein expressly provided.

In every written contract made by the Trustees relating to the Trust Estate, reference shall be made in this Declaration of Trust, and anyone contracting with the Trustees shall look only to the funds and property of the Trust Estate for payment under such contract, or for the payment of any debt, note, judgment or decree or of any money that may otherwise become due and payable by reason of the failure on the part of the Trustees to perform such contract, in whole or in part, or for any other cause, and neither the Trustees nor any of them, nor the Certificate Holders nor any of them, present or future, shall, in any event, be personally liable therefor" (R. 52 at fols. 156-158).

On October 10, 1935, the claims of certificate holders in this issue having been presented to the Superintendent of Insurance by the trustees pursuant to discretionary powers granted to them in the trust indenture, was approved by the Court in the amount of $56,171.37 (R. 19 at fol. 56). A dividend of 5% has been declared and paid thereon (R. 19 at fol. 57). It arose out of the liquidation of general assets of the title company and not out of the liquidation of any of the securities underlying the participation certificates in this particular issue of the title company (R. 159 at fol. 477).

The sole asset of the trust estate is worthless, unproductive land (R. 20 at fol. 59; R. 127 at fol. 381). There are general creditors of the trust estate, among them the respondents herein (R. 20 at fols. 59-60). The respondents seek payment out of the proceeds of such dividend monies arising, as indicated, not from liquidation of the assets

of this trust estate, but from a payment made to the trustees by the Superintendent of Insurance upon the claims of the certificate holders in this issue, the monies for such payment arising from the liquidation of general assets of the title company which were not part of this trust estate.

The Supreme Court of the State of New York to which this specific question was first presented held that the respondents were not entitled to payment out of these monies because they did not comprise part of the trust estate under the intent of either the trust indenture or of the statute pursuant to which this trust was created (R. 123 at fols. 388-393). Identical decisions resulted upon the presentation of the question to other courts of original jurisdiction in the State of New York in connection with the liquidation of other similar companies. In the instant "Test Case" the Supreme Court of the State of New York also held that were it otherwise to construe the trust indenture and the statute "a serious constitutional question would be presented" (R. 130 at fol. 389). The Appellate Division unanimously affirmed the Supreme Court (R. 139). The Court of Appeals unanimously reversed the lower courts, holding that though the statute did not go so far as to authorize a plan of reorganization which would alter the contract rights of the holders of guaranties, it could provide for the orderly and uniform enforcement of the obligation of the guaranteeing corporation by authorizing the vesting of the power of enforcement in the statutory trustees (R. 167). It assumed that the power to vest such right of enforcement in the trustees ipso facto carried with it the right to draw into the trust estate as assets thereof the dividends paid upon the claims on such guaranties (although the statute nowhere by its language provided for such diversion of such dividends from certificate holders who were the direct creditors of the liquidating company).

C

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended (R. Sec. 690; 28 U. S. C., Sec. 344). The final order and judgment of the Supreme Court of the State of New York to be reviewed was entered on October 27, 1942 (R. 151).

D

Statutes

The pertinent provisions of the statutes involved are set forth in the Appendix, infra, and concern the provisions of Chapter 745 of the Laws of 1933 of New York State as amended (Unconsol. Laws, Secs. 4871-4881, formerly Secs. 1796-1805), known as the Schackno Act.

E

Questions Presented

1. Whether the rights of certificate holders on their claims resulting from the direct obligations of mortgage and title companies to such certificate holders, set forth in the certificates issued to them (misnamed "guaranties" in such certificates), passed to the trustees of the various statutory estates, or whether such rights remained vested in the individual certificate holders.

2. Whether the Schackno Act by its provisions permitted the transfer of individual rights under such "guaranties", or of the proceeds thereof, to statutory trustees appointed by the Court pursuant to its provisions.

3. Whether such power, if not specifically contained in the Schackno Act, may be read into said act by implication.

4. Whether the Schackno Act, to the extent that it may incorporate such power either in words or by implication, is constitutional.

5. Whether the taking of dividend proceeds into a statutory trust as general assets thereof resulted in an unconstitutional deprivation of the property rights of individual certificate holders, where such dividend proceeds resulted from the liquidation of the general assets of the title company obligors and not from the liquidation of the assets of the statutory trust estate.

6. Whether payment to general creditors of statutory trust estates so created, from the proceeds of dividends paid upon claims founded on such direct obligations to certificate holders, constituted an unconstitutional deprivation of the property of such certificate holders, particularly in view of the provisions of the statutory trust indenture exonerating certificate holders from any personal liability to creditors of such trust estate.

F

Reasons for Granting the Writ

1. This is a "Test Case" under which the rights of certificate holders in hundreds of issues involving many thousands of dollars of dividends on claims on such "guaranties" will be affected and determined. Many hundreds of individuals and numerous institutions will be affected by the determination herein.

2. The reorganization or rehabilitation of large corporations involving millions of dollars in assets may be

directly affected by the determination herein. Many proceedings for such reorganization were directly predicated upon the uniform decisions and opinions of the lower State Courts and may be rendered nugatory by the instant reversal in the Court of Appeals of the State of New York.

3. A federal constitutional question is presented which has not heretofore been passed upon, to wit, whether the asset of an individual exonerated from personal obligation for the debts of a statutory trust may be reached directly or indirectly by creditors of such trust claiming the right to do so under the statute. (The trust here is admittedly a statutory trust. The claim upon the "guaranty" here is admittedly an individual asset. The individual certificate holders have admittedly been exonerated from liability for the obligations of the trust. By directing the trustees to use the dividends paid upon such "guaranties" for the payment of general creditors of the trust the State Court by indirection is frustrating the exoneration from liability provided for the individual certificate holder by both the statute and the indenture.)

4. The Schackno Act did not authorize any invasion of individual assets, but intended merely to provide:

(a) For the orderly liquidation of mortgage investments in which two or more individuals were interested; and

(b) For the orderly liquidation of the assets of the guaranteeing corporations.

By its express language it nowhere authorizes any invasion of any individual asset of any certificate holder. The purpose of the statute was to meet the emergency existing at the time of its enactment, caused by the fact that bonds and mortgages underlying guaranteed mortgage certificates could not be administered, or dealt with in any way, without unanimous consent of the holders of certificates

in each issue. The Supreme Court of the State of New York found as a matter of fact that there never was an emergency which required interference with the rights of certificate holders to enforce their individual "guaranties". The "guaranty" ran, not to the holder of the bond and mortgage, but to the holders of the certificates. The trustees never had possession of the certificates. The rights to enforce payment upon the "guaranties" were acquired by virtue of the certificate. The Schackno Act was enacted to meet an emergency. Being in derogation of the common law it should be strictly construed. Neither the words of the act nor its legislative history nor the purpose to be served requires the interpretation placed upon it by the Court of Appeals of the State of New York. That determination, if unchanged, destroys the safeguards for the protection of property rights provided for its citizens under the federal Constitution.

5. Holders of certificates in this and other issues similarly affected reside in various States and purchased their securities in interstate commerce and through the mails.

CONCLUSION

Wherefore, your petitioners pray that this petition for a writ of certiorari be granted.

CHARLES SEGAL,
Attorney for Petitioners.

December 17, 1942.

APPENDIX

Protection of Holders of Guaranteed Mortgages (Schackno Act)

Laws 1933, c. 745.

Renumbered 1942 as Sections 4871-4881 incl. of the Unconsolidated Laws.

An Act to provide for the protection of holders of mortgage investments guaranteed by title and mortgage guarantee corporations and investment companies. (L. 1933, c. 745, as amended by L. 1933, c. 780; L. 1934, c. 92; L. 1934, c. 906; L. 1934, c. 909; L. 1934, c. 919; L. 1935, c. 588, in effect April 27, 1935.)

§ 1796. Legislative declaration of fact and policy

§ 1. The legislature hereby declares the existence of a public emergency affecting the health, safety, and comfort of the people requiring the provisions of this act, arising out of the following circumstances. Approximately one billion of dollars in principal amount of real estate mortgage investments, sold, issued, distributed or guaranteed, directly or indirectly, by title and mortgage guaranty corporations or investment companies organized and now existing under the insurance law or banking law, respectively, are now outstanding; and such mortgage investments are widely held by hundreds of thousands of investors, a large percentage of whom are persons of only moderate means. As a result of the existing disruption of economic and financial processes, rental values have declined so sharply that it is impossible in many cases for owners of real estate to meet their obligations on the bonds, mortgages or other security against which mortgage investments have been issued guaranteed by such guaranty corporations, directly or indirectly. Numerous defaults aggregating millions of

dollars have occurred in the payment of interest and principal on such mortgage investments and on the bonds, mortgages and other security against which such mortgage investments have been issued; and widespread additional defaults are likely to occur therein. Under existing conditions any immediate liquidation of any substantial amount of such bonds, mortgages or other security in respect to which such defaults exist, or the attempt to do so, would so demoralize the general real estate market that there might be realized on such bonds, mortgages or other security substantially less than the face amount thereof and substantially less than would be realized if they were disposed of in an orderly manner over a reasonable period of time. Since the guaranty corporations are obligated to pay the amount of the deficiencies resulting from the liquidation of such bonds, mortgages or other security at less than the face amount thereof, the forced liquidation of the bonds, mortgages or other security would result in such unprecedented demands upon the resources of the guaranty corporations that their resources would be sufficient only to pay a relatively small portion of such demands. The guaranty corporations are not amenable to the federal bankruptcy law; and the holders of mortgage investments cannot avail themselves of the composition provisions of such bankruptcy laws for the settlement of their claims against such corporations in respect of guaranties undertaken by such corporations. The guaranty corporations are subject to control and regulation by the state and to the supervision of the superintendent of insurance or of the superintendent of banks.

It is therefore hereby declared to be essential for the public interest to provide a procedure under which such bonds, mortgages or other security may be liquidated in an orderly manner and under which the assets of the guaranty corporations may be administered and conserved equally and ratably in the interests of holders of mortgage investments.

§ 1797. APPLICATION OF ACT; DEFINITIONS

§ 2. This act shall apply to any title and mortgage guaranty corporation organized and now existing under the insurance law or to any investment company organized and now existing under the banking law, which shall have sold mortgage investments as hereinafter defined.

"Guaranty corporations" as used in this act shall include such title and mortgage guaranty corporations and investment companies.

"Superintendent" as used in this act shall mean the superintendent of insurance or the superintendent of banks having supervisory or regulatory powers under existing law over such title and mortgage guaranty corporations or investment companies as the case may be.

"Mortgage investments" as used in this act shall include all interests in bonds, notes and other evidences of indebtedness of individuals, partnerships, associations or corporations, secured by mortgage or mortgages upon, or deed or deeds of trust or similar evidences of an interest in, real property, situated in this state or outside of this state, guaranteed by a guaranty corporation, and all collateral trust bonds or notes of a guaranty corporation which are secured by pledge or assignment of any such interests; but shall not include any such bond, note or other evidence of indebtedness when the same shall be held entirely by only one person, firm or corporation or any such collateral trust obligations when all of them having the same security are held entirely by only one person, firm or corporation.

The words "functions of any guaranty corporation" shall include any or all of the duties, rights, functions, remedies and powers conferred with respect to any mortgage investments upon any guaranty corporation, directly or indirectly, by virtue of any statute, agreement or otherwise. (As amended by L. 1933, c. 780; L. 1936, c. 491, § 1, in effect May 9, 1936.)

§ 1798. Powers of superintendent

§ 3. The superintendent may, himself or by his duly authorized agent, take over, administer, exercise, conduct, execute and manage, or he may restrict, limit, govern, control, direct and regulate, any or all of the functions of any guaranty corporation with respect to any mortgage investment sold or guaranteed by such guaranty corporation, whenever in his opinion such action is necessary or advisable for the protection of such guaranty corporation or of the holders of such mortgage investment, in the event (1) that such guaranty company has been taken over by the superintendent for rehabilitation or liquidation, or (2) that there is a default under such mortgage investment, or under any bond, mortgage or other security against which such mortgage investment has been issued.

§ 1799. Collection and disposition of mortgage moneys

§ 4. The superintendent shall be authorized with respect to any bonds, mortgages or other security held by such guaranty corporation or otherwise, against which any mortgage investments have been issued, to do by himself or by his authorized agent, any of the following:

(a) To receive, collect and sue for the interest and principal of the bonds, mortgages and other security held by such guaranty corporation or otherwise, or to bring any foreclosure action on the same and take title to the property sold under such action in such name or names as he may determine;

(b) To deduct from any sum so obtained a reasonable amount to cover the costs and expenses of any such collection, suit, or foreclosure action, or any other functions performed by him pursuant to this act;

(c) To distribute the balance of such sums so collected to the holders of such mortgage investments or, at the election of the superintendent, (1) to withhold, for such time

as he deems expedient or desirable, all or any part thereof from distribution, or, (2) in his discretion, to apply all or any part thereof for any purpose whatsoever which he deems advisable or necessary for the protection of the interests of the holders of such mortgage investments.

§ 1800. Appointment of agent

§ 5. Where pursuant to the provisions of section three or four of this act the superintendent is authorized to appoint an agent to perform any of his duties or functions therein provided for, he may appoint as such agent the guaranty corporation involved in such default or any officer thereof, or any other person or corporation.

§ 1801. Reorganization

§ 6. (1) When the superintendent shall have exercised any of the powers granted to him under section three or four of this act, he or the holders of fifteen per centum in principal amount of such mortgage investments (exclusive of any part thereof held by the guaranty corporation which sold such mortgage investments), or a corporation organized under article twelve of the insurance law, as added by chapter four hundred fifty-three of the laws of nineteen hundred thirty-three, may promulgate a plan or agreement for the readjustment, modification, or reorganization of the rights of all of the holders of such mortgage investments, and the modification, readjustment or liquidation of the bonds, mortgages or other security against which such mortgage investments have been issued. Such plan or agreement shall be deemed to have been duly promulgated when the signatures of the required number of holders of such mortgage investments or their agents duly authorized shall appear on such plan or agreement or upon a written consent setting forth the substance of such plan or agreement. Such signatures may appear on any one copy of the plan, agreement or consent or may appear upon counter-

parts or separate consents if the aggregate signatures shall represent the required number. The name of the promulgators shall appear on the copy or summary to be submitted to the holders of such mortgage investments as herein provided. The superintendent shall thereupon obtain from such guaranty corporation a list of the holders of such mortgage investments. He shall thereupon submit such plan or agreement to all of the holders of such mortgage investments on such list by mailing a copy thereof (or a summary thereof prepared by him) to each such holder or to his duly authorized representative addressed to him, postage prepaid, to the address provided in such list, or if no such address be so provided, then to his last known address. He shall also mail such copy or summary to each other person or corporation known to the superintendent to have an interest which may be affected by the proposed plan or agreement. A copy of the plan or agreement shall be kept by the superintendent at an office of such superintendent available for public inspection, and he shall take such other steps as he may deem necessary for making the plan or agreement and all notices and facts in connection therewith available to all interested parties. (As amended by L. 1934, c. 919, in effect September 7, 1934.)

1-a. Any holder of a mortgage investment who desires in good faith to promulgate a plan or agreement of reorganization as provided in the preceding subdivision may, upon notice to the superintendent and the appropriate guaranty corporation, apply to the court, which, if satisfied as to the good faith of the applicant, shall order such guaranty corporation to furnish to such applicant a list of the holders of the mortgage investments who would be affected by such plan; but such list shall be retained by such applicant for the purpose specified and shall not otherwise be disclosed or published. (As added by L. 1934, c. 906, in effect August 31, 1934.)

(2) The superintendent shall prepare and mail to each such holder and each such other party, either with a copy of such plan or agreement or summary, or at any time subsequent thereto, a notice stating in substance that such plan will be presented to the court as hereinafter provided for, and designating a date, which date shall not be less than twenty days after the mailing of such notice, when such court will pass upon such plan or agreement and hear any objection thereto on the part of any holder of such mortgage investments or such other party as may have an interest therein.

Upon the return date of such notice, the superintendent shall indicate to the court whether or not he approves or disapproves such plan or agreement. The court shall hear the parties interested therein and, if it deem it necessary, may take testimony relative thereto and/or may take proof in affidavit form or through a referee appointed for the purpose as to any fact or circumstance material thereto. If a referee be appointed, he shall make and file a report with the court with all convenient speed. The costs of such reference shall be borne by such of the parties in such amounts as the court shall direct. The court shall thereupon approve, modify or disapprove such plan or agreement. No such plan or agreement shall become operative unless and until it shall have been approved, in its original or in a modified form by such court, and unless and until the holders of two-thirds in principal amount of such mortgage investments (exclusive of any part thereof held by the guaranty corporation which sold or guaranteed such mortgage investments) or their agent duly authorized, shall have consented to such plan or agreement. (As amended by L. 1935, c. 588, § 1, in effect April 27, 1935.)

(3) When any such plan or agreement shall have been so approved by the court and by such two-thirds in principal amount or their agent duly authorized therefor, such plan or agreement shall be binding upon all the holders of such mortgage investment and the guaranty corporation which

shall have sold or guaranteed the same; and all the holders of such mortgage investment shall be conclusively deemed to have consented to all of the terms and conditions of such plan or agreement whether or not all of such holders shall actually have consented and whether or not all of them shall have received notice of such plan or agreement or of such hearing as hereinbefore provided. Thereupon such steps shall be taken by the superintendent and all other parties, and all acts shall be done as may be required by such plan or agreement so approved and as may be necessary or desirable for the consummation of such plan or agreement.

(4) The expenses of the printing and mailing of such plan or agreement or the summary thereof shall be paid as follows: If the plan promulgated be the plan of the superintendent, he shall pay therefor out of any funds which may have come or may come into his possession out of such property. If the plan promulgated be that of the holders of fifteen per centum of such mortgage investments as provided for in this section or if the plan be that of a corporation organized under article twelve of the insurance law, as added by chapter four hundred fifty-three of the laws of nineteen hundred thirty-three then such holders or such corporation shall deposit with the superintendent in advance a sufficient sum of money to pay such expenses, which shall be used by the superintendent for such purposes. If such plan so promulgated by such holders or such corporation become operative as herein provided the superintendent shall repay to the holders or corporation making such deposit the expenses of such printing and mailing out of any funds which may have come or may come into his possession out of such property. (As amended by L. 1934, c. 919, in effect September 7, 1934.)

§ 1802. Liabilities not discharged

§ 7. The liability of any guaranty corporation with respect to any mortgage investments sold, issued, distributed

or guaranteed directly or indirectly by it shall not be discharged by any action taken pursuant to this act, except as otherwise expressly provided in any plan or agreement promulgated and approved as herein provided.

§ 1803. Powers of fiduciaries

§ 7-a. An executor, administrator, trustee, guardian, committee of an incompetent, or other person, including any official of the state or any political subdivision thereof, holding trust funds, who has lawfully invested any trust funds in mortgage investments may join in promulgating and/or may consent to a plan or agreement for the readjustment, modification, or reorganization of the rights of all the holders of such mortgage investments, and the modification, readjustment or liquidation of the bonds, mortgages or other security against which such mortgage investments have been issued; and after the entry of an order pursuant to this chapter approving or modifying such plan or agreement and providing that such plan or agreement is binding upon all the holders of such mortgage investments and the guaranty corporation which shall have sold or guaranteed them and all of the parties interested therein, then such executor, administrator, trustee, guardian, committee of an incompetent, or other person, may execute such instruments and do such acts as may be required by such plan or agreement so approved and as may be necessary or desirable for the consummation of such plan or agreement so approved, and may accept in exchange for such mortgage investments, and hold the same as legal investments, any securities or obligations, secured or unsecured, issued by a corporation organized pursuant to the order of the supreme court approving or modifying such plan or agreement, irrespective of whether or not such corporation acquires the bonds, mortgages, or other security against which such mortgage investments have been issued; and for the execution of such instruments, doing of such acts and/or the

acceptance of such securities or obligations, such executor, administrator, trustee, guardian, committee of an incompetent or other person shall not be subject to any liability whatsoever. (As added by L. 1934, c. 92, in effect March 24, 1934.)

§ 1804. Jurisdiction of supreme court

§ 8. The supreme court of the county in which any such guaranty corporation has or had its principal office is hereby vested with jurisdiction and authority to determine the fairness of any plan or agreement which may be promulgated hereunder with respect to any mortgage investments sold or guaranteed by such guaranty corporation and to approve, modify or disapprove the same, provided, however, that where the underlying security or securities, property or properties affected by such proposal or plan is or are located within one county, then the supreme court held in such county shall have such jurisdiction. If a referee be appointed he shall report his determination for confirmation or modification upon such notice as the court shall direct. Such court shall make an order approving, modifying or disapproving such plan or agreement. In the event that the court shall have approved or modified such plan or agreement; and if at the time of the entry of such order the court shall have been satisfied that sixty-six and two-thirds per centum of the holders in principal amount of such mortgage investment or their duly authorized agent have approved such plan or agreement, such order shall recite such fact, and shall thereupon be binding upon all the holders of such mortgage investments and the guaranty corporation which shall have sold or guaranteed them and all of the parties interested therein. If at the time of making such order such percentage of the holders of such mortgage investment shall not have approved of the same, such order shall provide that upon satisfactory proof of the fact that sixty-six and two-thirds per centum of the holders in principal amount of such mortgage investments shall have

approved the same, a further order may be entered ex parte approving such plan or agreement, which further order shall be binding upon all the holders of such mortgage investments and upon the guaranty corporation which shall have sold or guaranteed the same and upon all other parties interested therein. (As amended by L. 1935, c. 588, § 2, in effect April 27, 1935.)

§ 1805. Effect of unconstitutionality of part of this act

§ 8. If any provision of this act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the validity of the remainder of the act and the applicability of such provision to other persons and circumstances shall not be affected thereby.

§ 1806. Time of taking effect

§ 9. This act shall take effect immediately.

§ 1807. Continuance and duration of emergency

§ 9-a. The legislature hereby declares that the emergency declared by section one of this act still continues and that it may reasonably be expected to continue to and including the first day of January, nineteen hundred and forty; and the provisions of this act shall remain in force and effect to and including that day, but not longer unless otherwise hereafter provided by law. However, the termination of such period shall not impair or render ineffective any plan or agreement which becomes operative or impair any obligation which is incurred or right created before the termination of such period. (As added by L. 1934, c. 909, and amended by L. 1935, c. 588, in effect April 27, 1935.)

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1942.

No. 598.

In the Matter of

The Application of the People of the State of New York by George S. Van Schaick, as Superintendent of Insurance of the State of New York, for an order to take possession of the property of and rehabilitate the Lawyers Westchester Mortgage and Title Company.

A Plan of Readjustment, Modification or Reorganization of the Rights of the Holders of Mortgage Investments in a certain mortgage guaranteed by Lawyers Westchester Mortgage and Title Company, and designated as Issue No. 5-7902.

The Application for instructions as to disposition to be made of dividend payment on account of claim allowed on guaranty.

WILLIAM A. DAVIDSON, ISAAC SHENDELL, CARL S. BRESNICK and HELEN SEGAL,

Petitioners,

against

FREDERICK H. HURDMAN and others comprising the firm of HURDMAN & CRANSTOUN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MONROE J. CAHN,
WARNER PYNE,

Counsel for Respondents
Hurdman & Cranstoun.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The petitioners seek to review (petition, p. 2) a decision of the New York Court of Appeals (288 N. Y. 40; R., pp. 156-167) holding that, under a trust set up to liquidate certificated mortgage investments guaranteed by an insolvent mortgage company, the claims against the company on the guaranty, contained in the certificates, had been validly made a part of the trust estate and the dividends thereon thereby made responsible for and applicable to the payment of the debts incurred by the trust estate.

JURISDICTION.

This Court is without jurisdiction herein because (1) the order sought to be reviewed is not final; (2) the application is not timely; and (3) no federal question was raised below.

(1)

The petition (p. 9) states that review is sought of a "final order and judgment of the Supreme Court of the State of New York" entered October 27, 1942 (R., p. 151).

This Court is without jurisdiction to review that order because it is not

> "the final judgment or decree * * * in the highest court of the state in which a decision of the suit could be had."
>
> Section 8A; Act of Feb. 13, 1925;
> Ch. 229 (43 Stat. at L. 940);
> 28 U. S. C. A., section 350.

That order, entered on the remittitur of the New York Court of Appeals, made an adjudication pursuant to the

remittitur's direction (p. 145) "to proceed in accordance with the opinion herein" (R., pp. 144-145).

That new adjudication was made upon affidavits (R., p. 152), testimony (R., p. 152) and opinions of the Supreme Court (R., pp. 148, 152) not printed in this record despite the command of this Court's rules (Rule XXXVIII, para. 1).

That new adjudication was appealable to the Appellate Division of the New York Supreme Court and, if necessary, by permission, to the New York Court of Appeals, under sections 609 and 588 of the New York Civil Practice Act as follows:

"§ 609. Appeal from order of court in action.

An appeal may be taken to the Appellate Division of the Supreme Court from an order in an action, upon notice, made at a special term or trial term of the Supreme Court in either of the following cases:

* * * * * * * * *

3. Where it involves some part of the merits.

4. Where it affects a substantial right."

"§ 588. Jurisdiction of the Court of Appeals in civil actions and proceedings.

Appeals may be taken to the Court of Appeals in civil cases and proceedings as follows:

1. As of right from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding wherein is directly involved the construction of the Constitution of the State or of the United States, * * *

4. From a determination of the Appellate Division of the Supreme Court in any department, other than a judgment, or order which finally determines an action or special proceeding, where the Appellate Division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals, but in such case the

appeal shall bring up for review only the question or questions so certified; and the Court of Appeals shall certify to the Appellate Division its determination upon such question or questions.

5. From a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding, but which is not appealable under subdivision one of this section, where the Appellate Division shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or where, in case of the refusal so to certify, an appeal is allowed by the Court of Appeals. Such an appeal shall be allowed when required in the interest of substantial justice."

(2)

The fact is, however, as appears from the petition (pp. 2, 9), that review is sought not of the order of the New York Supreme Court of October 27, 1942 but of the judgment of the Court of Appeals of April 23, 1942 (R., p. 143) upon which the Supreme Court order was based (R., p. 154).

Addressed to the Court of Appeals judgment, the application is manifestly not timely, having been made nearly eight months after that judgment.

Apparently, petitioners believe that because the New York Supreme Court made the judgment of the Court of Appeals its own, the time runs from the Supreme Court order. The error in this view has long since been settled. While the writ of this Court may run to the New York Supreme Court as the holder of the record, the review is of the Court of Appeals judgment.

Department of Banking, State of Nebraska v. *Pink*, decided December 21, 1942;
Gelstin v. *Hoyt*, 3 Wheat. 246, 303, 335;
Atherton v. *Fowler*, 91 U. S. 143;
Crane Iron Co. v. *Hoagland*, 105 U. S. 701;
Shanks v. *D. L. & W. R. R. Co.*, 239 U. S. 556, 557;
Hodges v. *Snyder*, 261 U. S. 600, 601.

(3)

The petition wholly fails to comply with Rule XII, paragraph 1 of this Court, as required by Rule XXXVIII, paragraph 2 thereof.

That no federal question was presented to the courts below by either the petitioners or any party aligned with them, quickly appears from the record. No such suggestion is contained in the petition of the trustees seeking instructions (R., pp. 15, 23). No such suggestion is contained in the affidavit of William A. Davidson, the only certificate holder who interposed an affidavit (R., p. 121).

The record contains no certificate by any court that any federal question was presented to it.

It follows that no federal question here exists which this Court may review.

Honeyman v. *Hanan,* 300 U. S. 14, 19-26;
McGoldrick v. *Gulf Oil Corp.,* 309 U. S. 2;
Lynch v. *State of New York,* 293 U. S. 52, 54;
Purcell v. *N. Y. C. R. R. Co.,* 296 U. S. 545;
N. Y. Ex Rel Rosevale Realty Co. v. *Kleinert,* 268 U. S. 646, 650;
Consolidated Turnpike Co. v. *N. & O. V. R. R. Co.,* 228 U. S. 596, 599;
Home for Incurables v. *City of New York,* 187 U. S. 155, 157.

ARGUMENT.

The petition fails to set forth any federal question either in the "questions presented" or "reasons for granting the writ."

Petitioners suggest (pp. 9 to 10) six questions to be reviewed by this Court. It is immediately apparent that questions 1, 2 and 3 are not federal questions but questions for the State Court only, involving the meaning and interpretation of the Schackno Act, a state statute, with respect to which this Court is bound by the interpretation thereof given to it by the Court of Appeals.

> *Hotel & Restaurant E. I. Assn.* v. *Wisconsin E. R. Board,* 315 U. S. 437;
> *Beal* v. *M. P. R. R. Corp.,* 312 U. S. 45, 50.

What federal questions petitioners intend to present by questions 4, 5 and 6 are not apparent since no section of the federal Constitution claimed to be violated is referred to, as indeed no such reference can be found at any point in the petition. We believe that the use of the word "unconstitutional" is altogether too indefinite to inform either this Court or respondents of the grounds of the attack. Until the claim is made sufficiently explicit, we believe that there is nothing for us to answer.

Likewise, analysis of petitioners' "Reason for Granting the Writ" (p. 10) fails to disclose any federal question.

A mere reading of reasons 1, 2 and 5 suffices to establish such lack.

What "federal constitutional question" reason 3 presents is not stated. Therein, complaint is made that an individual asset has been authorized to be used to pay debts in "frustration" of provisions of both statute and trust indenture. What statutory provision is offended is not disclosed. We read none in the Schackno Act itself. Since the same instrument,

the trust indenture, provided the exoneration and included the claim on the guaranty as part of the trust estate, such provisions are of equal validity and must be read together. The exonerating clause (R., p. 52) merely relieved the certificate holders of personal liability for the trust debts. It did not pretend to relieve the trust corpus therefrom. In fact, in the very paragraph which exonerated the certificate holders, it expressly constituted such trust corpus solely responsible therefor (R., p. 53).

Reason 4 presents no federal question since it merely argues against the interpretation of the Shackno Act given by the Court of Appeals, which, as already pointed out, this Court may not review.

CONCLUSION.

For the foregoing reasons, this application should be denied.

Respectfully submitted,

MONROE J. CAHN,
WARNER PYNE,

Counsel for Respondents
Hurdman & Cranstoun.

Dated, December 30, 1942.